



**ADJUDICATION ORDER IN TERMS OF SECTION 53  
OF THE COMMUNITY SCHEMES OMBUD SERVICE ACT NO.9 OF 2011**

**Ref: CSOS00991/KZN/21**

IN THE MATTER BETWEEN

**NDUDUZO GUMEDE**

**APPLICANT**

and

**TRUSTEES OF SOMERSET BODY CORPORATE**

**RESPONDENT**

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**ADJUDICATION ORDER**

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**EXECUTIVE SUMMARY**

- Relief applied for in terms of the CSOS Act:

**Section 39(4)(c):** (4) In respect of meetings - (c) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association-

- (i) was void; or
- (ii) is invalid.

- Date Adjudication conducted:

4 April 2022.

- Name of the Adjudicator:

Howard Felix.

- Order:

The application is dismissed in terms of Section 53(1) the adjudicator considers the application to be misconceived.

No order as to costs.

## **INTRODUCTION**

1. The applicant is **NDUDUZO GUMEDE**, the registered owner of unit 9 Somerset, 450 Queen Elizabeth Road, Westridge, Durban, KwaZulu-Natal.
2. The respondent is the **TRUSTEES OF SOMERSET BODY CORPORATE**, a community scheme in terms of Section 2 of the Sectional Titles Schemes Management Act no. 8 of 2011.
3. This is an application for dispute resolution in terms of section 38 of the Community Schemes Ombud Service Act 9 of 2011 ("the CSOS Act"). The application was made in the prescribed form and lodged with the Community Schemes Ombud Service (CSOS) by way of email.
4. The application seeking relief in terms of Section 39 of the CSOS Act:  
*Section 39(4)(c): (4) In respect of meetings - (c) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association-*
  - (i) was void; or
  - (ii) is invalid.
5. On the 19<sup>th</sup> of May 2021, a notice in terms of Section 43, was served on the respondent
6. On the 27<sup>th</sup> of May 2021, a notice in terms of Section 44 was served on the applicant.
7. On the 24<sup>th</sup> of June 2021, the parties failed to reach a settlement at the

conciliation contemplated in terms of Section 47, CSOS accordingly referred the dispute directly to Adjudication in terms of section 48 of the CSOS Act.

8. On the 24<sup>th</sup> of March 2022, a notice requesting final written submissions was served on the parties.
9. This matter is adjudicated in terms of the CSOS Act and Practice Directive on Dispute Resolution, 2019 as amended and more specifically the amended Practice Directive dated 23 June 2020 which provides under paragraph 8.2 “Adjudications will be conducted on the papers filed by the parties and any further written submissions, documents and information as requested by the appointed Adjudicator”. The parties were requested to make written submissions. The adjudication was conducted on the 4<sup>th</sup> of April 2022, and an order is now determined.

### **PRELIMINARY ISSUES**

10. No preliminary issues were raised.

### **RELEVANT STATUTORY PROVISIONS**

11. Section 1 of the CSOS Act defines-

*"Community scheme" as "any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings, including but not limited to a sectional titles development scheme, a share block company, a home or property owner's association, however constituted, established to administer a property development, a housing scheme for retired persons, and a housing cooperative and "scheme" has the same meaning".*

*"dispute" as "a dispute in regard to the administration of a community scheme between persons who have a material interest in that scheme, of which one of the parties is the association, occupier or owner, acting individually or jointly."*

12. Section 38 of the CSOS Act provides-
- “Any person may make an application if such person is a party to or affected materially by a dispute.”*
13. Section 45(1) provides-
- “The Ombud has a discretion to grant or deny permission to amend the application or to grant permission subject to specified conditions at any time before the Ombud refers the application to an adjudicator.”*
14. Section 47 provides-
- “On acceptance of an application and after receipt of any submissions from affected persons or responses from the applicant, if the Ombud considers that there is a reasonable prospect of a negotiated settlement of the disputes set out in the application, the Ombud must refer the matter to conciliation.”*
15. Section 48 (1) provides-
- “If the conciliation contemplated in section 47 fails, the Ombud must refer the application together with any submissions and responses thereto to an adjudicator”.*
16. In terms of Section 50-
- “The adjudicator must investigate an application to decide whether it would be appropriate to make an order.”*
17. Section 51 provides for the investigative powers of the Adjudicator:
- “(1) When considering the application, the adjudicator may-*
- (a) require the applicant, managing agent or relevant person-*
    - (i) to give to the adjudicator further information or documentation.*
    - (ii) to give information in the form of an affidavit or statement; or*
    - (iii) subject to reasonable notice being given of the time and place, to come to the office of the adjudicator for an interview.*
  - (b) invite persons, whom the adjudicator considers able to assist in the resolution of issues raised in the application, to make written submissions to the adjudicator within a specified time; and*
  - (c) enter and inspect-*
    - (i) an association asset, record, or other document.*
    - (ii) any private area; and*
    - (iii) any common area, including a common area subject to an exclusive use arrangement.”*

## **SUMMARY OF RELEVANT EVIDENCE**

### **Applicant's Submissions**

18. The applicant submits that he fitted a safety gate because he has a 15 month old child in his flat.
19. The applicant submits that after he installed the safety gate he informed the chairperson of the body corporate, and she had no objection to the gate being installed.
20. The applicant submits that since the chairperson inspection he has received letters from the managing agent demanding him to remove the security gate.
21. The applicant submits that in response sent a letter to the managing agent appealing the decision to demand we remove the security gate because it is a safety feature for the 15-month-old child.
22. The applicant submits that the applicant has tried to follow the procedure by sending an email to the trustees after installing the gate, the applicant has never been given a fair chance to do things the right way, all the applicants ever got is an instruction to remove the gate. The applicant submits that an explanation has been given on his submission as to why the applicant installed the gate first and reported after installation.
23. The applicant submits that he is not requesting a permanent installation, he is requesting a temporary safety measure as the complex is not children friendly.
24. The applicant submits that he is not requesting an "exclusive use area" as it has been put, nor want to enjoy any 'special right', the gate only blocks a minor, it does not lock and is about a meter long if not less which makes it effortless for an adult to pass through, hence he submits that it does not interfere with the

neighbours nor interfere with the rights of other owners to use of the common property.

25. The applicant submits that he is raising a boy child, and he submits that most boy children can be naughty. The reason why the gate is not installed on the front door is that it was easy for the minor boy to find things to hold on to and climb over it, holding on to the door and door frames. Hence the applicant decided to put it where it is.
26. The applicant submits that the security gate is not to create a play area of some sort, or any special feature for him, he is always indoors, this is to eliminate any possible danger should he happen to accidentally go out on his own. As the respondent mentioned the applicant is on the top floor.
27. The applicant submits that it must be noted that this request is only for until the applicant's son can walk the stairs, then the gate will be removed and any damages to property will be fixed.
28. The applicant submits that the respondent is not enforcing the rules equally and submitted photos of other owners installed awnings and pot plants which require drilling.

**Relief sought by the Applicant:**

29. The applicant seeks an order in terms of Section 39(4)(c) declaring that the decision to demand the applicant remove the safety gate be declared invalid.

**Respondent's Submissions**

30. The respondent submits that on 7 May 2021 Mr Mthembu erected the gate as

depicted in Annexure A of his application across the passageway by attaching it by screws to the balustrade on one side and to the external wall of the units on the other side.

31. The respondent submits that the passageway is part of the common property and the effect of the gate is that it prohibits owners and other persons from the use of the corridor beyond the point of the gate and creates an unauthorised exclusive use area for the applicant.

32. The respondent submits that the installation of the gate was done without the knowledge or consent of the trustees or the Body Corporate and is problematic for two reasons. Firstly, the installation of the gate is a clear contravention of the provisions of paragraphs 4.1 and 4.2 of the Conduct Rules which state that:

*“4. An owner or occupier shall not mark, paint, drive nails or screws or the like into, or otherwise damage or alter or add any structure, fixture or fitting to any part of the common property without first obtaining the written consent of the trustees. An owner shall be liable to compensate the body corporate for any damages caused to the common property by that owner, his/her lessee, occupant, guests, and any member of his /her family.*

*4.2 An owner or occupier shall not instal:*

*4.2.1 any locking device, safety gate, burglar bars or other safety device for the protection of his/her section; or*

*4.2.2 any screen or other device to prevent the entry of animals or insects without the prior written consent of the trustees who shall be entitled to prescribe the nature and design of the device and the manner of its installation”*

33. The respondent submits that the second issue is that the installation of the gate effectively creates an unauthorised exclusive use area on part of the corridor which interferes with the rights of other owners to use of the common property.

34. The respondent submits that an exclusive use area can only be allocated by the Body Corporate (not the trustees) by way of unanimous special resolution. The trustees have no power to authorise an exclusive use area.

35. The respondent submits that the applicant alleges that the passageway is

“Within our unit”. This is incorrect. The corridor is part of the common property and Mr Gumede does not enjoy any special right to it.

36. The respondent submits that the chairperson or trustee cannot, on their own, decide on behalf of the trustees or the Body Corporate. Decisions of trustees or the Body Corporate must be taken at properly constituted meetings.
37. The respondent submits that the applicant fails to give any explanation as to why the safety gate cannot be fixed across his front doorway which is the usual place for such gates. Furthermore, a gate across his door would not have interfered with the common property.
38. The respondent submits that the applicant fails to give any explanation as to why the safety gate cannot be fixed across his front doorway which is the usual place for such gates. Furthermore, a gate across his door would not have interfered with the common property.
39. The respondent submits that the trustees deny that they are flexible in applying the Rules or that they have treated Mr Gumede unfairly. Mr Gumede never submitted a proper application in writing which came before the trustees for their consideration. In any event, the trustees do not have the power to allow an exclusive use area.
40. The respondent submits that the applicant has not identified where Annexure B is on the property, and we cannot comment on this but reserve our rights to do so. However, this appears to be a hanging basket which does not create an exclusive use area or interfere with other owners' rights.
41. The respondent submits that insofar as Annexure C is concerned, Mr Gumede has chosen an example which does not assist his case. The owner complied with the rules and requested permission in writing to instal the canopy and submitted brochures of possible designs for approval. The trustees selected one which was then installed. Furthermore, this canopy does not unduly interfere with the common property nor restrict the rights of other owners.

42. The respondent submits that the applicant has not furnished any reasons as to why the gate could not be erected across his front door or as to why he failed to comply with the Rules.
43. The respondent submits that the trustees cannot authorise an exclusive use area which in effect is what Mr Gumede wants. As this is decision of the Body Corporate which has never been sought, this application is premature.
44. The respondent submits that the applicant has failed to remove the gate after being requested to do so and the trustees will now proceed to remove it and to recover the costs from the applicant.

**Relief sought by the Respondent.**

45. None.

**EVALUATION & FINDING**

46. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
47. The general rule is that only evidence, which is relevant, should be considered. Relevance is determined with reference to the issues in dispute. The degree or extent of proof required is a balance of probabilities. This means that once all the evidence has been tendered, it must be weighted up and determined whether the applicant's version is probable. It involves findings of facts based on an assessment of credibility and probabilities.
48. The applicant seeks an order in terms of Section 39(4)(c) declaring that the decision to demand the applicant remove the safety gate be declared invalid.

49. Section 39(4)(c) of the CSOS Act states:

**Section 39(4)(c):** (4) *In respect of meetings - (c) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association-*

*(i) was void; or*

*(ii) is invalid.*

50. The applicant has submitted that he sent a letter to the managing agent to appeal the decision to demand he remove the safety gate as the only step he took to resolve the dispute internally before launching this application.

51. The respondent submits that the effect of the gate is that it prohibits owners and other persons from the use of the corridor beyond the point of the gate and creates an unauthorised exclusive use area for the applicant and the applicant would need to pass a unanimous resolution for the applicant to maintain the security gate.

52. The adjudicator finds that the applicant has not taken steps to pass an unanimous resolution or any other internal remedies before launching this application.

53. The adjudicator refers to Clauses 9.1 and 9.2 of the practice directives on dispute resolution.

Clause 9.1 of the practice directives states:

*“9.1. All Applicants must attempt to resolve the dispute internally within the community scheme before seeking relief from the CSOS.”*

Clause 9.2 of the practice directives states:

*“9.2. The Applicant must submit together with the application, proof that any prescribed internal processes for resolution of the dispute have been exhausted or submit reasons why an internal process could not be followed.”*

54. The adjudicator finds that the applicant has breached Clauses 9.1 and 9.2 of the practice directives, because the internal process between the body corporate and applicant has not been exhausted.

55. The adjudicator refers to Clause 5.3. of the practise directives which states the following:

*“The applicant bears the onus of ensuring that all relevant information has been submitted to ‘make their case’ in other words, to ensure their application form is correctly completed and meets legislative requirements.”*

56. The adjudicator finds that this application must be dismissed because the applicant has not submitted proof in terms of Clause 9.2 of the practice directives that the internal processes for dispute have been exhausted. and therefore, breached Clause 5.3.

57. The application is dismissed in terms of Section 53(1). the adjudicator considers the application to be misconceived.

### **COSTS**

58. No order as to costs.

### **ADJUDICATION ORDER**

59. The application is dismissed in terms of Section 53(1). the adjudicator considers the application to be misconceived.

### **RIGHT OF APPEAL**

60. Section 57 of the CSOS Act, provides for the right of appeal-

*(1) An applicant, the association or any affected person who is dissatisfied by an adjudicator's order, may appeal to the High Court, but only on a question of law.*

*(2) An appeal against an order must be lodged within 30 days after the date of delivery of the order of the adjudicator.*

*(3) A person who appeals against an order, may also apply to the High Court to stay the operation of the order appealed against to secure the effectiveness of the appeal.*

**DATED ON THIS 08<sup>TH</sup> DAY OF APRIL 2022.**

*Howard Felix*

**HOWARD FELIX  
ADJUDICATOR**